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Supreme Court of the United States

OCTOBER TERM, [redacted] 1968

No. 1334

GOLTEN MARINE COMPANY, INC.,
Petitioner,

—against—

TRELLEBORGS ANGPARTYGS A/B
and CHARLES McLAUGHLIN,
Respondents.

BRIEF AND APPENDIX OF RESPONDENT TRELLEBORGS ANGFARTYGS A/B IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is not a shipowner entitled to indemnity for a contractor's breach of its warranty of workmanlike performance based on a jury finding that the contractor's employee (plaintiff) performed his work in an unsafe manner?

2. Was petitioner entitled to a trial by jury on the issue of whether there was conduct sufficient to preclude indemnity to the shipowner when the Trial Court directed a verdict against petitioner for its failure to adduce any evidence of such conduct?

STATEMENT OF THE CASE

While petitioner's statement of the facts of the case is generally accurate, there are important omissions which should be brought to the Court's attention.

The Trial Judge specifically found* that there was no evidence in the record to support a finding that the shipowner had in any way prevented Golten from fulfilling its obligation to render a workmanlike performance or had violated any obligation it owed to Golten.

The jury found the shipowner negligent with respect to the plaintiff and the vessel unseaworthy. The jury also found plaintiff contributorily negligent and fixed the quantum of his contributory negligence at 16⅔%.

Petitioner assumes, solely on the basis of the aforementioned jury findings, that the verdict represents an apportionment by the jury of all the negligence in this case. Petitioner argues that the jury's verdict assesses the major fault (83⅓%) against the shipowner and only lesser fault (16⅔%) against petitioner. This is the fallacy (or as the Trial Judge said, [Appendix 1b] "I don't think we are going to play with numbers") upon which the petitioner has erected its entire argument.

The argument conveniently overlooks the indisputable fact that the shipowner was liable to respond in damages for *any*** negligence or unseaworthiness, provided such negligence or unseaworthiness was a proximate cause of plaintiff's injury. It also assumes a jury finding that negli-

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*Respondent's Appendix.

**Petitioner's premise assumes that since the jury found plaintiff 16⅔% negligent, the shipowner would inevitably be 83⅓% negligent on any mathematical distribution of guilt. Herein lies its error, for it is just as reasonable to conclude, if such a scale were to be employed, that the shipowner was held negligent for only 5% of total fault since e.g. plaintiff's co-worker Kewn was 33⅓% negligent and plaintiff's foreman Erickson was 45% negligent.

gence was the sole factor in bringing about plaintiff's injury. Most importantly, this argument ignores the fact that petitioner's liability to the shipowner was not based on a theory of negligence or unseaworthiness but resulted from Golten's breach of its warranty of workmanlike performance which it owed to the shipowner.

REASONS FOR DENYING THE WRIT

POINT I.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT BELOW AND THE DECISIONS OF THIS COURT ON THE INDEMNITY ISSUE.

The result herein accommodates itself well within the decisions of this Court. The liability has been placed "upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury". *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 324 (1964).

Golten was under a duty to perform its work aboard the m/s Lake Ontario in a safe and proper manner, *Ryan Stevedoring Corp.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 133 (1956).

The jury finding that plaintiff, McLaughlin, was contributorily negligent ruled out any subsequent finding by the same jury that McLaughlin, in his capacity as an employee of Golten, was not negligent. In this situation, the Trial Judge quite properly imputed McLaughlin's negligence to Golten under well established principles of *respondeat superior*. Golten's negligence which brought the unseaworthiness of the vessel into play amounted to a breach of its warranty of workmanlike performance, *Crumady* v. *Joachim Henrik Fisser, et al.*, 358 U. S. 423, 429 (1959).

There was a condition precedent to the shipowner's

right to indemnity which had to be fulfilled before it could recover from Golten. It had to be shown that there was no conduct on the shipowner's part sufficient to preclude such a recovery. *Weyerhauser S. S. Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563, 567 (1958).

It is submitted that there is no proof of negligent conduct by the shipowner in the record other than its failure to discover an unsafe or unseaworthy engine room hoist. No evidence of conduct on the part of the shipowner sufficient to preclude a recovery in indemnity was offered on the trial of this case or asserted in the Court of Appeals.

It is well established that the mere existence of such an unseaworthy condition on board a vessel is insufficient to preclude the shipowner's recovery of indemnity where the contractor's negligence brought the unseaworthiness of the vessel into play. *Crumady* v. *Joachim Hendrik Fisser, supra.*

Petitioner leaps on the recent decision of this Court in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., Ltd.* U. S. , 37 LW 4271, April 1, 1969 as holding that any shipowner negligence entitles the contractor to a recovery back of the indemnity awarded to the shipowner against that contractor. This argument is patently absurd. The proposition that in a case where a shipowner is not precluded from recovering indemnity from the contractor, it would nevertheless be liable to the latter in indemnity, if implemented by this Court, would create, to use petitioner's frame of reference, a real "Wonderland".

This Court's opinion in *Burnside, supra* is carefully circumscribed. Thus:

(1) This Court referred in its opinion only to an affirmative stevedore action to recoup compensation payments;

(2) The stevedore was presumed "faultless";

(3) This Court tacitly, if not openly, acknowledges, as it has in the past,* that the shipowner may be negligent and still recover from the stevedore or contractor if that negligence is not sufficient to preclude indemnity (*Burnside, supra,* footnote 17).

(4) The existing line of indemnity decisions handed down by this Court since 1956 are in no way reversed, modified, limited or criticized in Burnside.

POINT II.

THERE IS NO CONFLICT EITHER INTRA OR INTER CIRCUIT ON THE ISSUE OF IMPUTATION OF PLAINTIFF'S NEGLIGENCE TO HIS EMPLOYER.

The decisions of Judge Kaufman in *Cavalleri* v. *Isthmian Lines,* 189 F. Supp. 525 and 190 F. Supp. 801, can hardly be considered to have created an intra circuit conflict since they are decisions by a then District Court Judge. Petitioner surely cannot mean that a conflict arises because that Judge was later elevated to the Court of Appeals for the Second Circuit. Understandably, petitioner has been unable to cite any decisions of the Court of Appeals for the Second Circuit in support of its claim of an intra circuit conflict.

The three cases cited by petitioner in support of its contention that a conflict exists between the Second and Fifth Circuits as to the imputation of plaintiff's contributory negligence to his employer are not in point.

In *Drewery* v. *Daspit Bros. Marine Divers, Inc.,* 317 F. 2d 425 (5 Cir., 1963), the Court interpreted the provisions of an express contract of indemnity. In *Loffland Bros. Co.* v. *Roberts,* 386 F. 2d 540 (5 Cir., 1967), the Ryan doctrine

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* *Italia Societa* v. *Oregon Stevedoring Co.,* 376 U. S. 315 at 320 ". . . the shipowner's negligence is not fatal to recovery against the stevedore." And at 321 ". . . recovery in indemnity for breach of the stevedores warranty is based upon an agreement between shipowner and stevedore and is not necessarily affected or defeated by the shipowner's negligence whether active or passive, primary or secondary."

did not apply since it had been stipulated that the offshore platform was not a vessel. In *Maple's* case, 1966 A. M. C. 2032, 2035 (S. D. Tex., 1966); affirmed sub nom *D/S A/S Sverre* v. *Texports Stevedore Co., Inc.,* 387 F. 2d 648 (5 Cir., 1968) the Court specifically held that the shipowner's conduct was sufficient to preclude indemnity.

It should be pointed out that while petitioner has been busily seeking conflicts between the Second and Fifth Circuits, it overlooked on this point, the decision of the Court of Appeals of the Fifth Circuit in *D/S Ove Skou* v. *Hebert,* 365 F. 2d 341, 350 (5 Cir., 1966), where the Court cited with approval *Mortensen* v. *A/S Glittre,* 348 F. 2d 383 (2 Cir., 1965). Significantly, *Mortensen* was the case relied on by the Trial Judge when he directed the verdict for the shipowner in its indemnity suit. The Court of Appeals for the Second Circuit also recognized this case as controlling.

The *D/S Ove Skou* case in the Fifth Circuit, far from being in conflict with this case has certain striking parallel features. The District Court there held plaintiff 20% contributorily negligent. Under petitioner's reasoning, this would mean 80% shipowner fault, yet the Court of Appeals reversed a 50% indemnity award and granted the shipowner full indemnity.

POINT III.

PETITIONER WAS NOT ENTITLED TO A JURY DETERMINATION ON THE ISSUE OF CONDUCT SUFFICIENT TO PRECLUDE WHERE IT FAILED TO ADDUCE ANY EVIDENCE OF SUCH CONDUCT.

Concededly, the issues involved in a shipowner's claim for indemnity are for jury determination where a jury trial has been demanded, as it was in this case. However, when during the course of the trial no proof is presented to the jury on an issue, it can hardly be argued that entry of

a directed verdict on that issue deprived the litigant of its right to trial by jury.*

Petitioner's major point is that the trial jury should have been permitted to determine whether the shipowner's negligence (failing to discover the defect in the engine room hoist) constituted conduct sufficient to preclude on the part of the shipowner. However, an affirmative determination of this issue by the jury would conflict with this Court's rulings in *Crumady* v. *Joachim Hendrik Fisser, supra* and *Waterman S. S. Corp.* v. *Dugan McNamara,* 364 U. S. 421 (1960). In both cases, this Court held that the initial creation of an unsafe condition by a shipowner did not excuse the contractor's breach of its warranty of workmanlike performance.

The propriety of the Trial Judge directing a verdict where there can be but one reasonable conclusion as to the verdict has been clearly established by decisions of this Court. *Brady* v. *Southern Ry. Co.,* 320 U. S. 476 (1943); *Galloway* v. *United States,* 319 U. S. 372 (1943).

Except for its failure to discover the defective condition of the engine room hoist, the trial record in this case is completely devoid of proof of negligence on the part of the shipowner.

Because the jury's conclusive finding of contributory negligence also constituted a finding that petitioner breached its warranty of workmanlike performance, petitioner cannot logically argue, as it attempts to do, that the shipowner's indemnity claim presented issues of fact for determination by the jury. What the Trial Judge did was to apply the applicable law to the existing jury verdict in the complete absence of any proof of conduct sufficient to preclude.

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*The Trial Judge challenged Golten's trial counsel to point out any proof in the record of shipowner's conduct sufficient to preclude (Respondent's Appendix).

CONCLUSION

THE PETITION SHOULD BE DENIED.

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APPENDIX

EXCERPTS FROM THE ARGUMENT ON THE MOTIONS FOR DIRECTED VERDICT

—824A—

THE COURT: But in Mortonson it was 33⅓. I don't think we are going to play with numbers. I think if, in fact, they were negligent, and negligence contributed to the happening of the accident, that's it.

* * *

—827A—

THE COURT: . . . Where in the record is there proof that this shipowner did anything to prevent the stevedore from fulfilling its obligation?

Because obviously, a defendant could not take advantage of its own wrong. Where is that in the record?

MR. COHEN: It's hard to say unless we first have some definition as to what our obligation was that we failed to do.

* * *

—828A—

* * *

THE COURT: The jury had the right to believe that maybe he shouldn't have stepped in at that time, and having done it, he didn't perform as a reasonably prudent stevedore. Or maybe in observing the oil, he should have taken other precautions.

And I think I charged on the assumption (—829A—) of risk and said to them that nevertheless even knowing the dangers, he is required to behave as a reasonably prudent individual.

So they found he did not.

MR. COHEN: Yes.

THE COURT: Now, what he failed to do or what he did negligently is imputed to the stevedore.

MR. COHEN: Yes. But it's an opaqued verdict. We don't know specifically what it was that the jury felt that he should have done, but failed to do or——

THE COURT: Now you are arguing with the jury's verdict. You are not interpreting.

* * *

—831A—

* * *

THE COURT: I know. But they negligently failed to perform the services for which they contracted. It was substandard. The jury found that, in effect.

* * *

—837A—

* * *

THE COURT: All right. You show me on the record where it supported the defense, an issue of fact to show that the shipowner prevented the stevedore from fulfilling its obligation under its warranty.

MR. COHEN: The Weyerhaeuser case indicates the test is whether the shipowner was guilty of conduct sufficient to preclude (—838A—) indemnity.

* * *

—839A—

THE COURT: I find there is no evidence on the record to support a finding that the shipowner prevented the stevedore from fulfilling its obligation to perform its work in a workmanlike manner.

I find that there is nothing in the record to show that the shipowner violated its contract so as to defeat its right to a claim over against the stevedore. So that I find as a matter of law the shipowner is entitled to indemnity against the stevedore. And the motion for a directed verdict is granted.

* * *